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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID A. CAVINDER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 02A03-0612-CR-594

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause Nos. 02D07-0406-FD-404, 02D07-0406-FD-405

August 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

David A. Cavinder appeals the revocation of his probation. Cavinder challenges the sufficiency of the evidence to revoke his probation. Specifically, Cavinder argues the trial court erred in granting the State's motion to incorporate an earlier finding that he was guilty of aiding in robbery into the revocation of probation hearing. We affirm, concluding the trial court did not err in granting the State's motion to incorporate an earlier finding, and that there was sufficient evidence to revoke Cavinder's probation.

Facts and Procedural History

The facts most favorable to the judgment indicate that on December 29, 2004, Cavinder was sentenced to five years suspended to probation under two different causes; the trial court ordered the sentences to be served concurrently. On February 9, 2006, the State filed a petition to revoke Cavinder's probation alleging he "[d]id not report for supervision as instructed." Appellant's Appendix at 13. On May 10, 2006, the State filed an amended petition to revoke Cavinder's probation alleging he "[d]id not maintain good behavior" as he had "[c]ommitted the offense of Aiding in Burglary." *Id.* at 15. On October 11, 2006, a jury returned a guilty verdict in Cavinder's criminal trial for aiding in burglary.

On November 2, 2006, the trial court held a sentencing hearing concerning the aiding in burglary conviction. During the sentencing hearing, the trial court found that Cavinder was "guilty of Aiding in Burglary, as a Class B Felony." Transcript at 22-23. Immediately thereafter, the trial court held a revocation of probation hearing, and during this proceeding, the State moved to incorporate the trial court's earlier finding that Cavinder was guilty of

aiding in burglary as evidence of a violation of probation. Cavinder objected and asked the trial court to hold a separate hearing concerning the revocation of probation. At the same time, however, Cavinder declared he did not want “more Court dates.” Id. at 30. The trial court granted the State’s motion “only as it relates to the new allegation that [Cavinder] did not maintain good behavior by committing the offense of Aiding Burglary in that cause number.” Id.

The trial court found that the allegation that Cavinder committed a new crime was proven by a preponderance of the evidence and revoked Cavinder’s probation. The trial court ordered Cavinder to serve the suspended portion of each sentence for both causes under which he was previously on probation.

Discussion and Decision

I. Revocation of Probation

Cavinder argues the trial court erred in revoking his probation. Specifically, he argues the “trial court improperly took judicial notice of a new conviction as the sole evidence of his violation.” Brief of Appellant at 6. Cavinder essentially challenges the sufficiency of the evidence supporting the revocation of his probation.

A. Standard of Review

Probation revocation proceedings are civil in nature, and the State must prove a violation of probation by a preponderance of the evidence. Thornton v. State, 792 N.E.2d 94,

96 (Ind. Ct. App. 2003); see also Ind. Code § 35-38-2-3(e).¹ We review the trial court’s revocation of probation for an abuse of discretion. Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. Rosa v. State, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005).

B. Judicial Notice

Cavinder argues that, “[a]s the only evidence of a probation violation was the judicial notice or ‘incorporated’ evidence of the new conviction, the probation revocation was supported solely by improperly admitted evidence.” Brief of Appellant at 7. He cites to the general rule that the “trial court may not take judicial notice of its own records in another case previously before the court even on a related subject and related parties.” Id. at 6 (citing Woods v. State, 654 N.E.2d 1153 (Ind. Ct. App. 1995)).

However, in Henderson v. State, our supreme court indicated:

[W]hile it is widely recognized that a trial court may not take judicial notice of its own records in another case previously before the court even on a related subject with related parties, this rule should not be fully applicable in probation revocation hearings. Given the nature of a revocation proceeding, to require technical procedural and evidentiary rules similar to those required at the pretrial and trial phases of our criminal justice system would unduly burden revocation proceedings.

544 N.E.2d 507, 513 (Ind. 1989) (citations omitted) (quoting Szymenski v. State, 500 N.E.2d 213, 215 (Ind. Ct. App. 1986)). In Henderson, the trial court held the defendant’s sentencing hearing for a burglary conviction and the revocation of probation hearing for an earlier

¹ The requirement that the defendant refrain from committing additional crimes is a condition of probation, even

conviction on separate days. During the probation revocation hearing, the trial court found that the defendant's conviction for burglary constituted a violation of probation and thus revoked his probation. Our supreme court held that the "burglary conviction provided grounds supporting the trial court in its finding that [the defendant] had violated his probation." Id.

Also, in Bane v. State, 579 N.E.2d 1339 (Ind. Ct. App. 1991), we held that the trial court did not err when it sentenced a defendant and, moments later, in the same consolidated hearing with the same parties, revoked the defendant's probation on a prior conviction without requiring additional proof that the defendant violated his probation by committing the crime for which he was sentenced a few moments earlier. Id. at 1341. Although the sentencing and revocation were two different matters, "the consolidation of the two matters in a single hearing nullifies the distinction for purposes of admission of evidence." Id. Further, we have noted that "the rule barring a trial court from taking judicial notice of other cases previously before that court has not been applied to probation revocation hearings." Whatley v. State, 847 N.E.2d 1007, 1009 (Ind. Ct. App. 2006).

Here, the trial court noted at the sentencing hearing:

Having been found guilty following a trial by jury, you are now here for sentencing. Having considered and reviewed the written Pre-sentence Investigation Report and having heard and considered the evidence at your trial, as well as the comments of your mother...your girlfriend...and the victim, the Court now finds that you are guilty of Aiding in Burglary.

if the probation order does not mention the requirement. See Boyd v. State, 481 N.E.2d 1124, 1127 (Ind. Ct. App. 1985).

Tr. at 22. Subsequently, the State moved to incorporate this finding into the probation revocation hearing. The trial court granted the State's motion to incorporate the finding over Cavinder's objection. See Woods, 654 N.E.2d at 1155 ("A trial judge may take judicial notice of a fact which is either generally known within the territorial jurisdiction of the trial court, or is capable of accurate and ready determination by resorting to a source whose accuracy cannot reasonably be disputed").

The trial court then relied on the finding of Cavinder's guilt for aiding in burglary to determine that Cavinder had violated his probation by committing a new crime. The trial court apparently did not consolidate the revocation of probation hearing and the sentencing hearing into one proceeding. See Bane, 579 N.E.2d at 1341 (citing Trusler v. Galambos, 238 Ind. 195, 149 N.E.2d 550 (1958) ("before consolidation occurs, trial court should issue an order of record stating that consolidation will occur")). However, similarly to Henderson, the trial court here used Cavinder's aiding in burglary conviction as evidence to revoke his probation. Thus, the trial court did not abuse its discretion by granting the State's motion to incorporate an earlier finding that Cavinder was guilty of aiding in burglary.

Conclusion

Because the trial court did not err in granting the State's motion to incorporate an earlier finding, there was sufficient evidence to support the finding that Cavinder violated his probation. For this reason, we affirm the revocation of Cavinder's probation.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.